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Supreme Court of the United States

October Term, 1951

No. 30

FLORENCE M. COOK, *Petitioner*,

v.

ARTHUR W. COOK, *Respondent*.

RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

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THE OPINIONS BELOW

The trial court made findings of fact and what amounted to conclusions of law thereon without formal opinion. (R. 12). The Supreme Court of Vermont rendered a formal opinion (Original transcript P. 34, 36-37), entered a decree thereon, November 15, 1950. The opinion is reported under the style *Cook* v. *Cook,* 116 Vt. 374, 76 A2d 593.

JURISDICTION

The judgment of the Supreme Court of Vermont was entered on November 15, 1950. (R. 22). This petition was presented within 90 days from the entry of the judgment below. Jurisdiction is invoked under Section 237 (b) of the Judicial Code, 28 U. S. C. Sect. 344 (b). The questions presented were raised by a reversal of a judgment of the Windsor County Court, and the entry of an appellate decree annulling the marriage of the parties hereto by avoiding a divorce obtained by petitioner in the State of Florida.

QUESTIONS PRESENTED

(1.) After finding as a matter of fact that Petitioner here never established a legal residence for the purpose of divorce as required by the Statutes of the State of Florida and never intended to reside in Florida and that whatever time she spent in Florida was solely for divorce purposes and she intended to remain there only long enough to obtain her divorce, and did obtain a purported divorce by fraud and perjury upon the Florida Court in regards to her residence in Florida and that such purported divorce was not valid under the Florida laws, (Findings of Fact Sections 4, 11, 12, 16.) did the Supreme Court of Vermont err in holding that such deception by Petitioner upon the Florida Court involving its jurisdiction was such as to invalidate the decree and relieve the Vermont Court from giving recognition and force and effect to such decree.

(2.) In a suit for annulment in the domiciliary state of Petitioner, are the Courts of that state required to give force and effect to a fraudulently obtained decree of divorce in the courts of a sister state where the fraud went to the jurisdiction of the court rather than the cause for divorce?

STATEMENT

Respondent has been in the United States Navy since March 8, 1938. He has been a resident of and has had a residence in Windsor, Vermont since 1940. (F. F. 2). Petitioner entered into a marriage ceremony with Respondent at Elizabeth City, North Carolina February 5, 1943. (F. F. 1).

About two months after the marriage, Respondent here discovered that Petitioner was the wife of another man. Respondent and Petitioner agreed that she should go to Florida, remain there long enough to establish a residence for divorce purposes, secure a divorce there and then return to Respondent in Virginia, and that they would then re-marry Petitioner left Yorktown, Virginia where she and Respondent had lived together since the February marriage; she remained in Florida a short time and then went to Pennsylvania. Later she returned to Florida for a short period Whatever time she spent in Florida in 1943 was solely for divorce purposes and with no intention on her part to establish a bona fide residence there. She intended to be physically present there only long enough to obtain her divorce. This was understood and agreed upon by the Respondent here. (F. F. 2). September 10, 1943 Petitioner was granted a divorce in the Circuit Court of the Eleventh Judicial District in and for Dade County, Florida. (F. F. 2). The Findings of fact clearly indicate that there was no reliable evidence that "petitioner's husband appeared and participated" in the Florida divorce proceedings. The Findings of fact make no mention whatever of her husband appearing or participating in any way. (F. F. 2). Two or three days after the decree of divorce, Petitioner and Respondent met in Newport News, Virginia. Respondent at that time was stationed on Naval duty at Yorktown, Virginia. From then until December 18, 1943,

the parties saw each other every day and on December 18, 1943, went through another marriage ceremony at Elkton, Maryland. (F. F. 3).

On March 29, 1949 Petitioner here instituted an action for separate maintenance against Respondent here, in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in which it was alleged that the parties were married at Elkton, Maryland, December 18, 1944 and were at the time of the aforesaid separation action residents of the city and County of Honolulu, Hawaii. In this action a decree was entered April 7, 1949, permitting Petitioner to live separate and apart from Respondent for a period of two years and ordering Respondent to pay Petitioner here monthly maintenance. (F. F. 3 and 4).

In December, 1949 in the Windsor County Court, Vermont, while the aforesaid maintenance order was still pending and extant, Respondent here filed a petition for annulment as to both of the marriages between the parties, namely, that of February, 1943 and December, 1943. The Trial Court found judgment that the purported marriage between the parties in February, 1943 was void. The Trial Court also found that Petitioner here never intended to establish a residence in the State of Florida; never did establish a residence in the State of Florida; and only spent time in the State of Florida solely for the purpose of obtaining a divorce. In substance and effect, the Trial Court's finding was that the parties fraudulently attempted to confer divorce jurisdiction in the Florida courts. Nevertheless, the Trial Court considered itself bound by the said Florida Court's decree of divorce with respect to matters of residence and domicile of the parties and refused to annul the void marriage of December, 1943.

The Supreme Court of Vermont, because Respondent has had a bona fide residence in the County of Windsor,

State of Vermont since 1940, and because the Florida decree of divorce rendered in 1943 was procured by fraud with respect to residence which went to the jurisdiction of the Florida Court, refused to give full faith and credit to said Florida decree under authority of the judgment of this Court in the case of *Williams* vs. *North Carolina*, 325 U. S. 226.

While in some instances the use of the words "domicile" and "residence" are considered synonymous and interchangeable, they cannot in fact be used haphazardly in matters having to do with the jurisdiction of the Courts in divorce and annulment proceedings.

In the sense that at different times the parties hereto lived in the State of Virginia and in Hawaii, they did at such times have residence in those jurisdictions, but they were not, and it is not claimed that they were, legal domiciliaries or legal residents of those jurisdictions in the sense of being citizens thereof. In fact, from 1940, Respondent here was a citizen of the State of Vermont in that he had and maintained a legal residence in the County of Windsor, State of Vermont and had never at any time declared or exhibited an intention of acquiring legal domicile or residence elsewhere.

Petitioner here did on several occasions actually present herself in the State of Florida during the year 1943 and for such periods lived in Florida. However, it was her avowed and admitted intention *not* to reside in Florida, but to be there only as necessary to procure a divorce and to leave the State of Florida immediately upon procurement of divorce. Certainly she was never capable of claiming under such circumstances that Florida was her state of legal domicile or residence, nor even that she acquired such residence as intended by the Florida law to confer upon the courts of that state jurisdiction over her person for the purpose of divorce. Under such cir-

cumstances, she and her husband could not possibly confer jurisdiction upon the Florida Court. So far as the Record discloses neither Petitioner nor her then husband had ever before even visited the State of Florida.

Under the Findings of Fact by the Trial Court of Windsor County, Vermont, admitted by Petitioner herein, a fraud attempting to confer jurisdiction upon the Florida Court was perpetrated. Under the circumstances, it cannot be claimed and indeed is not herein argued by Petitioner, that the Florida Court ever had jurisdiction over Petitioner and her then husband in 1943 to grant a divorce. Indeed Petitioner is in the position of virtually admitting that a fraud as to the jurisdiction was perpetrated on the Florida Court, but attempts to invoke the res judicata theory to avoid the application by the Supreme Court of Vermont of the clear principles laid down in the Second Williams case. For the purpose of this proceeding, it makes no difference what the legal domicile of the Petitioner and her first husband might be. The only pertinent point is that they were not domiciled in Florida nor had either one of them established a bona fide residence in the State of Florida prior to the divorce decree of 1943. Nor does the record show in the Findings of Fact that Petitioner or her husband even remotely approached creating a bona fide residence in Florida or that the husband participated in her fraudulent proceedings in such fashion as to permit this case to come within the narrow limits of *Sherrer* vs. *Sherrer*, 334 U. S. 343, and *Coe* vs. *Coe*, 334 U. S. 378.

Under the circumstances, as disclosed by the Record here, the Supreme Court of the State of Vermont seemingly acted entirely in accord with both the language and spirit of the so-called Second Williams case, that is, *Williams* vs. *North Carolina*, 325 U. S. 226, 89 Lawyers Ed. 1577, wherein the Court said:

"All the world is not party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven states, provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question. In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact. To permit the necessary finding of domicile by one state to foreclose all states in the protection of their social institutions would be intolerable."

and again,

"But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a state which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders."

and again,

"As to the truth or existence of a fact, like that of domicile, upon which depends the power to exert judicial authority, a state not a party to the exertion of such judicial authority in another state but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact."

Reduced to a simple straight-forward consideration, the Supreme Court of the State of Vermont, in the instant case, exercised its proper jurisdiction to consider the petition for annulment of marriage filed by one of its own citizens who maintained an unquestioned and unchallenged domicile and residence in the State of Vermont for several years prior to the void marriage and continuously thereafter up to and including the time when

the petition for annulment was filed and in acting upon the unchallenged and uncontradicted facts found in its judgment that Florida undoubtedly and indisputably did not have jurisdiction over the Petitioner and her husband in the 1943 divorce proceedings.

Thereupon, under the plain and unmistakable doctrine of the Second Williams case, the Vermont Supreme Court refused to entertain said fraudulent divorce, procured without proper jurisdiction of the Florida Court, to stand as a defense and impediment against annulment of the void marriage entered into between the parties hereto in December, 1943 following the invalid Florida divorce.

Point One

The Respondent contends, as does the Petitioner, that Florida is the final arbiter of the criteria of domicile or residence of its citizens. (Page 5 Petitioner's Brief). Indeed, the Vermont Court in passing upon the cause, found the Florida law to require actual bona fide residence which in turn required an intention on the part of complaining party to reside there permanently. Florida, herself, thus fixed and determined this test. The Findings of Fact show the Petitioner did not meet the test. In the case of *Wade* vs. *Wade* 93 Florida 1004 the Court said:

> "The word 'reside' has reference to the complainant's legal residence, which means the place which an individual has made the chief seat of his household affairs or home interests, from which, without some special mission, he has no intention of departing; from which when he has departed, he is considered to be away from home; and to which, when he has returned, he is considered to have returned home."
>
> "A legal residence or domicile in this State may be acquired by one who, coming from another state or

country, actually lives in this State, with the intention of permanently remaining here. In such a case a domicile by choice is established. Legal residence consists of fact and intention. Both must concur."

"The mere intention to acquire a new domicile, unaccompanied by actual removal, avails nothing; neither does the fact or removal avail without the intention."

Again, in *Chisholm* vs. *Chisholm* 98 Florida 1197 the Appellate Court of Florida said:

"Two years' residence required of a complainant in suits for divorce means a legal residence, a place of domicile or permanent abode; a place which complainant makes the chief seat of his household affairs or home interests."

"The prerequisite two years' residence in this State of the complainant in a suit for divorce (except when the cause is based upon adultery of defendant) is jurisdictional and must be both alleged in the bill and established by proof, and an admission thereof by the parties in the pleadings is ineffectual as a substitute for proof, and it is not an instance in which facts going to the jurisdiction may be effectually admitted by the parties."

However, the important thing to remember is that, not only is this the law of Florida, but that the Vermont Courts *found* it to be the law of Florida and gave it effect. In other words the Vermont Court did exactly what the Florida Court would have been compelled to do, if it had not been blinded by the false and perjured testimony of the Petitioner here, that is namely, to find itself without jurisdiction in the matter.

Therefore, this is not a case of one state contesting the rights or interests of another, but rather a case of one state giving a foreign decree the same effect that it was entitled in the state where it was rendered. The

Petitioner here argues that that Florida decree could not be attacked either directly or collaterally in Florida. Not only is this an absurd argument but it is certainly not the law of Florida as found by the Vermont Court nor does the Petitioner support such an argument with any authority. In the case of *Chisholm* vs. *Chisholm* supra the Florida Court held that a judgment void for lack of jurisdiction can be set aside at any time.

Point Two

It is the contention of the Respondent here that the assertion of the Petitioner that the divorce decree she secured in Florida was valid under the Florida law is without merit. In the annulment suit brought in the Vermont Court, the Petitioner here was a party defendant. She personally appeared and contested the cause. One of the issues was whether the Florida divorce decree was valid under the laws of Florida. This issue was eventually determined by the Supreme Court of Vermont against this Petitioner and in favor of this Respondent. Therefore the fact that her Florida divorce decree, rendered by reason of her perjured testimony was and is void, is a fact judicially determined and she is barred from relitigating the same again.

The Petitioners' real contention is that her divorce decree is valid in Florida, therefore is entitled full faith everywhere else. The difficulty with this claim is that the contrary has been judicially determined against her and so far as this Court is concerned it is bound by the findings of fact made in the Courts below. (See *Chicago Life Ins.* vs. *Cherry* 224 U. S. 25; *Baldwin* vs. *Iowa Traveling Men's Assn.* 283 U. S. 522; *Coe* vs. *Coe* 334 U. S. 378; *Sherrer* v. *Sherrer* 334 U. S. 343; *Estin* v. *Estin* 334 U. S. 541.)

Point Three

The Respondent says that it should be borne in mind that the Vermont Courts have not attempted to relitigate the issue here between the Petitioner and her former husband. What the Vermont Courts actually did was to determine the real status of the Respondent here and the Petitioner. It is obvious that their marital status depended upon the marital status between the Petitioner and her first husband and in doing this they found and applied the law of Florida. Certainly Florida could have no complaint about a sister state, in the far distant North, respecting her laws and doing whatever she can towards helping Florida enforce her laws. To hold the Petitioner's contention sound would be putting the stamp of approval upon fraud and perjury and would be telling all other states that *all* judgments and decrees, even those admittedly void, under the very laws which they were purportedly rendered, would require full faith and credit. If this principle is adopted, the very fundamentals of our judicial system would come tumbling down for the only pillars of support in the final analysis are truth in our Courts and honesty in our evidence.

Point Four

It appears to be the contention of the Petitioner here that under *Coe* vs. *Coe* 334 U. S. 378, the Florida decree is not subject to attack anywhere by anyone. Even assuming that this fact had not been decided adversely to her in the Vermont Court, does it appear reasonable to believe that a court can be tricked and deceived into giving a valid decree which it could not and would not give but for the deceit and mistaken belief? Does or can fraud and perjury supply jurisdiction in cases where the law has withheld it? What the Petitioner here is contending is that once fraud is perpetrated and perjury committed the effects cannot be undone. For authority

see *Coe* vs. *Coe* supra and *Sherrer* vs. *Sherrer* supra. An examination of these cases shows them to be of no help to her. In *Sherrer* vs. *Sherrer* the Florida decree was not attacked on the premise that it was void in Florida, as in the instant case. As a matter of fact the Florida divorce was assumed by both parties and this Court to be valid under the laws of Florida. (See 334 U. S., top of page 349.) In this connection the Court said: "That the jurisdiction of the Florida Court to enter a valid decree of divorce was dependent upon petitioner's domicile in that State is not disputed. This requirement was recognized by the Florida Court which rendered the divorce decree, and the principle has been given frequent application in decisions of the State Supreme Court."

Also in the Sherrer and Coe cases the factual situation was entirely different from the instant case. The Respondent here was not a party to the foreign divorce proceedings nor was he before the court to litigate the issues.

Another distinguishing point is that in neither the Sherrer case nor the Coe case was there any showing that the Florida decree was not valid in Florida where it was rendered. Instead, those cases turned upon the question of the rights of Massachusetts to deny full faith and credit to a judicial decree which *was* valid under the laws of Florida while in the instant case Vermont has refused full faith and credit to a Florida decree which admittedly was not entitled to full faith and credit in its own state.

It is inconceivably absurd to say Vermont should be compelled to honor a decree rendered not only by reason of false and perjured testimony but by a court powerless to act because of its own statutory limitations. If jurisdiction of courts could be enlarged by litigants' perjured testimony then jurisdiction would no longer be a matter of statutory control. The very thing that the

Petitioner here contends amounts to this proposition. It has been found as a fact that she perjured herself in regard to her domicile, yet she claims it makes no difference since her husband appeared, although the record does not show that he did appear. As a matter of fact the record shows that he did *not* appear. Assuming that he did appear this situation is no better for appearance cannot confer jurisdiction over subject matter. In the Florida case of *Taylor* vs. *Taylor* 132 Florida 694, the Court said in part: "We do not mean to hold, however, that further consideration of the question of jurisdiction is precluded, because if the circuit court was and is without jurisdiction because of fact, if it is shown to be a fact, that the complainant had not established his residence in Florida, but was in Florida only temporarily for the purpose of securing a divorce, then the general appearance of the defendant cannot confer jurisdiction on the court."

CONCLUSION

The Respondent says that in view of the foregoing law, Findings of fact and arguments that the decree of the Vermont Supreme Court should be upheld.

Respectfully submitted,

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